United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2620

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 74-2620

UNITED STATES OF AMERICA,
Appellee,

—v.—

PETER PLAGIANAKOS,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2620

UNITED STATES OF AMERICA,

Appellee,

—v.—

PETER PLAGIANAKOS,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Peter Plagianakos appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on November 26, 1974, after a two day trial before the Honorable John M. Cannella, United States District Judge, and a jury.

Indictment 74 Cr. 460, filed May 3, 1974, charged Plagianakos in Count One with conspiracy to distribute narcotics, in Count Two with distributing 26.5 grams of cocaine on November 7, 1973, and in Count Three with possession with intent to distribute of one ounce of cocaine on November 17, 1973. Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B), 846.

Trial commenced against Plagianakos on October 25, 1974. On October 29 he was found guilty on Count One,

and not guilty on Counts Two and Three. On November 26, 1974 Judge Cannella suspended imposition of sentence and placed Plagianakos on probation for a period of three years, to be followed by a special parole term of three years. Judge Cannella also imposed a fine of $2,500, to be paid during the course of the probation and parole. Execution of the sentence has been stayed pending this appeal.

Statement of Facts

A. The Government's Case

In October, 1973, Peter Plagianakos loaned Joseph Casino $1600 for the purchase of two ounces of cocaine. Prior to the loan Casino told Plagianakos that he would use the money to buy cocaine, cut it, sell it, and thus repay the loan with interest. (Tr. 67-68).* After the two ounces were purchased, however, Casino, an admitted drug user, consumed one of the ounces himself. Plagianakos, unwilling to entrust the remaining ounce to Casino's care, took it from him. (Tr. 69-70).

On November 1, 1973 Special Agent Patrick Shea of the Drug Enforcement Administration, acting in an undercover capacity as a businessman from Washington, D.C. interested in purchasig narcotics, was introduced by an informant to Casino at the latter's apartment at 525 Hudson Street in Manhattan. Casino told Shea that he would be able to provide him with cocaine and added that he had recently purchased two ounces with money lent him by a friend. Casino also indicated that he had used one of the ounces and that his friend was holding the balance. Shea expressed an interest in buying the remaining ounce, and a tentative price of $900 was agreed upon. Although Casino never mentioned his friend by name to Shea, he did make

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* "Tr." refers to the trial transcript. "Br." refers to appellant's brief; "A." refers to appellant's appendix.

three phone calls in Shea's presence in which he asked, unsuccessfully, for "Pete." After the third of these calls, Casino explained that his source was unavailable and suggested that Shea call him that day. Shea then left the apartment. (Tr. 15-19, 71-73).

Shea called Casino that evening and was informed that the cocaine was still unavailable. (Tr. 19, 73). Shea called Casino again on November 4, purportedly from Washington, D.C. It was agreed that a sale would be arranged during Shea's next trip to New York City. Casino suggested that Shea call him on the evening before his expected arrival in New York (Tr. 20, 74). In November 6, Shea again called Casino and advised him that he would be in New York the following day. Casino told him that the cocaine was accessible but his friend was holding it for him (Tr. 20-21, 74). On November 7, the day of Shea's supposed arrival in New York, he placed three calls to Casino. During the second of these Casino informed him that the cocaine was readily available and was located in Brooklyn. During the last of these calls Shea was told to come to Casino's apartment at 525 Hudson Street at 7:15 P.M. that evening (Tr. 21-24, 74-75).

Shea arrived at Casino's apartment at approximately 7:15 and upon entering was informed by Casino that his friend had not yet arrived. At approximately 7:30, Casino received a telephone call from Plagianakos informing him that he had been delayed in traffic but would arrive shortly. Prior to his arrival, Casino had informed Shea that his source did not want to meet any customers, and that Shea would thus have to remain in a separate room during the transaction. Shea accordingly went into Casino's living room, and when Plagianakos arrived at 7:45 P.M., he and Casino went into a small dressing room. (Tr. 24-26, 77-79).

In the dressing room, Plagianakos gave Casino a bag containing cocaine. Casino tested it, weighed it, diluted it,

and brought it to Shea. Shea paid Casino $900 and left the apartment at approximately 8:00 (Tr. 27-29, 79-80).

Casino did not immediately hand the $900 over to Plagianakos, who had remained behind in the apartment. Instead, at approximately 8:30 the two men drove to the apartment of Alvin Sigalow, located at 333 East 55th Street in Manhattan. While Plagianakos remained outside in the car, Casino went into the apartment to explore the making of another purchase of cocaine from Sigalow, one of Casino's principal suppliers, with the money he had obtained from Shea. He was dissatisfied with the quality of Sigalow's merchandise that evening, however, and finally gave Plagianakos the $900. Plagianakos then drove Casino back to his apartment before returning to his home in Brooklyn (Tr. 29-33, 119-120).

On November 19, 1973, Shea placed a telephone call to Casino at approximately 10:00 A.M. He informed Casino that he was in New York for the day and wished to buy some cocaine. Casino stated in response that he would try to make the necessary arrangements. He then telephoned Plagianakos and askd if he could borrow approximately one thousand dollars. Plagianakos said that he would be at Casino's apartment at 1:30 that afternoon. (Tr. 33-34, 84-85).

Plagianakos arrived with the thousand dollars at Casino's apartment at 1:30, accompanied by one John Merola. When Shea called again at 2:00, Casino informed him that his "friend" had arrived and they were about to look for a source of cocaine. (Tr. 34-35, 86).

For the next two hours, Casino, Plagianakos and Merola traveled around Casino's neighborhood in an unsuccessful search for cocaine. The three men then returned to Casino's apartment, where Casino received another call from Shea at 4:00. Casino told Shea that he was having difficulty

finding a source but that he would certainly have something by 6:00 that evening. Casino then placed a call to Alvin Sigalow and arranged to purchase cocaine at Sigalow's apartment. (Tr. 36-38).

Casino, Plagianakos and Merola then drove to 333 East 55th Street. Casino went to Sigalow's apartment and purchased an ounce of cocaine. He then left the apartment and drove off with Plagianakos and Merola, who had been waiting for him in a car outside the apartment building. The three men proceeded in the car to Second Avenue near 23rd Street, where they were arrested by agents of the Drug Enforcement Administration.* (Tr. 38-39, 105-107, 121-123).

B. The Defense Case

The defendant offered no evidence.

ARGUMENT

POINT I

The Court's supplemental charge was in no way prejudicial to the defendant.

A. The Court did not invade the jury's province as fact finder.

After several hours of deliberation the jury sent in a note saying, "Define conspiracy as it applies to this case." (Tr. 237). Judge Cannella delivered a supplemental charge which, we submit, fully complied with this request. (Tr. 237-243). Plagianakos now contends that this charge was un-

* Of the remaining defendants, Casino entered a plea of guilty to Information 74 Cr. 177 and was placed on probation for a term of four years. Sigalow entered a plea of guilty to Information 74 Cr. 759 and was placed on probation for a period of three years. Merola was not indicted.

duly prejudical in two respects. It is first contended that at one point in his supplemental charge Judge Cannella instructed the jury that a conspiracy existed as a matter of law, and thereby usurped the jury's role as fact finder.

In support of this contention Plagianakos cites two sentences from the Court's supplemental charge (Br. 14). The passage has, of course, been wrenched out of context. The entire relevant portion of the Court's charge reads as follows:

> *"If it is established beyond a reasonable doubt that a conspiracy existed—and certainly if you take the testimony of Casino and you believe that he had a source of supply from whom he bought, there was at least a conspiracy as between those two—the question is whether the defendant was in it.* That is another question. But there you have at least two people who are acting in a manner that seems to indicate that a conspiracy existed. That, of course, does not answer the question about the defendant being a member of it, but at least it answers the question whether or not there was a conspiracy which was in existence.
>
> I will repeat that. *If it is established beyond a reasonable doubt that a conspiracy existed* and that the defendant was one of its members—which is the crucial issue here: was he one of its members—then the acts and declarations of any other member of such conspiracy in or out of the defendant's presence, done in furtherance of the objects of the conspiracy and during its existence, may be considered as evidence against the defendant. When men enter into an agreement for an unlawful purpose, they become the agents for one another." (Tr. 241) [Italics supplied.]

The foregoing passage clearly demonstrates that what Plagianakos deems the Court's "finding" was in fact a care-

fully qualified hypothesis in which the jury was reminded not once but twice that it could find the existence of a conspiracy only if it accepted the Government's evidence "beyond a reasonable doubt." *Cf. United States* v. *Aloi*, Dkt. No. 74-1220 (2d Cir., January 31, 1975), slip op. at 6071-6072.

Nor can this passage be considered in isolation. It is axiomatic that the fairness of a trial judge's charge must be considered "in the context of the whole trial record, particularly the evidence and the arguments of the parties." *United States* v. *Tourine*, 428 F.2d 865, 869 (2d Cir. 1970), *cert. denied*, 400 U.S. 1020 (1971). See also *United States* v. *DeAngelis*, 490 F.2d 1004 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974). An examination of Judge Cannella's instructions *in toto* discloses that he did not foreclose a single material fact from the jury's determination. At the very outset of his supplemental charge he reminded the jury that in order to conclude that a conspiracy existed it must find an agreement between two or more persons. (Tr. 237-238). Again, at the conclusion of his charge he enumerated once again each of the elements that the jury was required to find:

> "*So, in the last analysis, if you find beyond a reasonable doubt that a conspiracy existed to violate the Federal Narcotics Control Act* and that the defendant knowingly and willfully was a member of the conspiracy, with an intent to further its objectives, and that during its existence an overt act which is alleged in the papers was knowingly done by one or more of the conspirators in furtherance of the conspiracy, and that the defendant knew that the violations which were executed by the members of the agreement were violations of the Federal Narcotics Control Act, then each one of them that is in it at that time would be guilty of this charge. *This all must be by evidence which convinces you beyond a*

> *reasonable doubt.* That is generally the law as it applies to this area." (Tr. 242-243) [Italics supplied.]

In addition, the Court had previously reminded the jury at the very outset of its charge that "you as the jury are the sole and sovereign judges of the facts. Anything that the lawyers have said about the facts or anything that the Court will say about the facts does not bind you in any way whatsoever. It is what you find the facts to be that controls in this case." (Tr. 199-200). See *United States* v. *Tourine, supra,* 428 F.2d at 870.

Plagianakos further claims that "[t]he existence or non-existence of a conspiracy was a major issue in the case." (Br. 15). Quite the contrary, it is apparent that at no point in the trial did defense counsel seriously question the existence of a conspiracy between Casino and Sigalow. The Government submits that any fair reading of defense counsel's summation discloses that his arguments were directly almost exclusively to the question of Plagianakos' membership in the conspiracy, not to the question of the existence of the conspiracy *vel non.**

Finally, the Government submits that Plagianakos waived his challenge to this supposed infirmity in the Court's charge by his counsel's failure to take any specific objection to it. At the conclusion of the supplemental charge defense counsel made the following statement:

> "Mr. Rosenbaum: Your Honor, may I make an objection for the record. I felt that during your ex-

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* See, e.g.,: "Throughout the entire trial there has not been one scintilla of evidence showing that Mr. Plagianakos sold anything to anybody. There isn't one scintilla of testimony that shows that Mr. Plagianakos possessed any drug of any kind." (Tr. 171).

And again: "Now, the testimony is that Mr. Plagianakos is the proprietor of two restaurants. He is making money. Why would he want to get mixed up in a deal like this where there is no money to be made?" (Tr. 172).

> planation of the conspiracy charge you also discussed what allegedly transpired during the case and that you commented on the evidence." (Tr. 243)

Defense counsel thus objected only to the Court's supposedly prejudicial comments on the evidence; he did not argue that the Court has usurped the jury's function by "finding" one of the ultimate facts. Although he now attributes critical significance to this supposed finding, it appears to have escaped his attention when uttered by the Court. Judge Friendly's observation in a similar context should be recalled here:

> "If the judge's inadvertent error did not attract the attention of the alert and capable counsel representing these defendants, it is fanciful to think that this single sentence in a charge of more than sixty printed pages so impressed the jury as to have influenced their decision. . . ." *United States* v. *Kahaner,* 317 F.2d 459, 479 (2d Cir.), *cert. denied,* 375 U.S. 836 (1963).

B. The Court did not improperly comment on the evidence.

The second defect which Plagianakos perceives in the Court's supplemental charge is a supposedly prejudicial marshalling of the evidence. In support of this claim he again cites a passage (Br. 17-18) out of context. The full text of the relevant portion of the supplemental charge reads as follows:

> "It is up to you to draw inferences from evidence that is in the case, and you can determine whether or not this defendant was in this picture to help it succeed and whether or not he was a participant, as the Government claims, or was he simply a fellow that was hanging around, happened to have been there and happened to have associated with him, as

the defendant lawyer has indicated to you in his summation. This is the nub of the case, actually.

Of course, the Government has indicated to you a large number of circumstances which they would suggest to you—and you don't have to buy this, but if you find it is based on the facts you may buy it—clearly indicate that he was not merely a participant; namely, why did he hold that ounce of drugs when Casino brought it back and he said to him in effect, 'Don't you hold it, because you'll use it and there goes the stuff or the thing,' as he called it—I don't remember what the expression was that was used. In addition to that, how come he happened to be there at the time that these things are happening? How come that the car happens to be registered in an address where he lives, where he goes down to Seagate? And various other items of that kind.

The defendant would suggest to you that that is coincidental; that these things are not indications of guilt in and of themselves, except possibly for the alleged possession of the ounce of cocaine when Casino returned it to him. But all the other items he suggests are all capable of innocent interpretation. Of course, this is the very thing that you have to decide." (Tr. 240-241).

The Government submits that the passage discloses nothing more than the Court's attempt to present to the jury alternative interpretations of the evidence. If this presentation gave greater attention to the Government's version than the defendant's, that is simply because the Government presented all of the evidence, and the defendant presented nothing. This Court's observation in *United States* v. *Tourine, supra,* 428 F.2d at 869-870 thus applies here *a fortiori*:

"Although most of what [the Court] had to say concerned the Government's, rather than the defen-

> dant's evidence, there was a great deal more of the former, which ran over three hundred pages, than the latter, which covered less than one hundred pages of the trial transcript."

See also *United States* v. *Light,* 394 F.2d 908, 911 (2d Cir. 1968); *United States* v. *Edwards,* 366 F.2d 853, 868 (2d Cir. 1966), *cert. denied,* 386 U.S. 966 (1967); *United States* v. *Dardi,* 330 F.2d 316, 330 (2d Cir.), *cert. denied,* 379 U.S. 845 (1964); *United States* v. *Kahaner,* 317 F.2d 459, 476 (2d Cir.), *cert. denied,* 375 U.S. 836 (1963); *United States* v. *Bando,* 244 F.2d 833, 844 (2d Cir.), *cert. denied,* 355 U.S. 844 (1957).

The jury's note invited, and even necessitated, comment upon the evidence. The only evidence presented at trial was offered by the Government, and that evidence overwhelmingly established Plagianakos' membership in the conspiracy to sell cocaine. Nevertheless in commenting upon this evidence Judge Cannella took considerable pains to present the competing versions of the facts to the jury, and to qualify any recitation of the Government's evidence with the admonition that such facts must be found beyond a reasonable doubt. He thus complied fully with the guidelines established by this Court in *United States* v. *Tourine, supra*:

> "So long as the trial judge does not by one means or another try to impose his own opinions and conclusions as to the facts on the jury, and does not act as an advocate in advancing factual findings of his own, he may in his discretion decide what evidence he will comment upon." 428 F.2d at 869.*

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* In his brief Plagianakos appears to place principal reliance on *United States* v. *Grunberger,* 431 F.2d 1062 (2d Cir. 1970), a cursory reading of which will disclose its complete inapplicability to the instant case. In *Grunberger* the trial court charged that a particular statement of the defendant's was a declarative sentence and thus an admission, whereas the defense had argued that the

[Footnote continued on following page]

POINT II

The Government fully complied with its obligations under the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases.

Prior to trial Plagianakos moved to dismiss the indictment because of the Government's failure to be ready for trial within six months of the date of his arrest. (A. 13-A. 15). Judge Cannella denied the motion in a decision filed June 5, 1974 (A. 35-A. 43). Plagianakos now renews this contention on appeal.

In his opinion, Judge Cannella made the following findings. Plagianakos was arrested on November 19, 1973 and arraigned before a magistrate the following day. Although he appeared without counsel at arraignment, he filed no affidavit of indigency and informed the magistrate that he would retain counsel. On May 3, 1974, Indictment 74 Cr. 460 was filed and was placed on the Part I Calendar for pleading on May 13, 1974. See Rule 7(A) of the Calendar Rules of the United States District Court for the Southern District of New York. Plagianakos appeared without counsel in Part I on May 13, 1974, and Judge Gurfein thereupon adjourned the case until May 20. (Tr. of May 13, 1974, 1-4). On May 20, Plagianakos appeared with counsel and entered a not guilty plea to the indictment. The Govern-

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statement had been cast in the form of a question and thus admitted nothing. The defect which this Court perceived in the *Grunberger* charge was the trial court's failure to present to the jury an alternative interpretation of a critically disputed fact. In the instant case Judge Cannella invariably presented the defense interpretation for consideration alongside the Government's.

The *Grunberger* court also noted that the trial court's omission acquired added significance because "the factual issues were close and the Government's case was not particularly strong." 431 F.2d at 1069. This case can hardly be so characterized.

ment served * its notice of readiness for trial that same day.** (A. 37-A. 38).

On the foregoing facts Judge Cannella quite correctly found that there had been no violation of Rule 4 of the Southern District's Plan for Achieving Prompt Disposition of Criminal Cases ("the Plan"), which requires the Government to be ready for trial within six months of the initiation of a criminal proceeding. The Plan was promulgated pursuant to Rule 50(b) of the Federal Rules of Criminal Procedure. Rule 45(a) of those Rules provides that time shall be computed in the following manner:

> In computing any period of time the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday.

Judge Cannella found that pursuant to Rule 4 of the Plan, the time within which the Government was required to be ready would have expired on May 19, 1974. However, because May 19 was a Sunday, the period was extended

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* The notice of readiness is file-stamped May 21, 1974, but contains an affidavit, sworn to May 20, 1974, that it was served on May 20. We believe that it was tendered to the Clerk of the District Court for filing on May 20, and Plagianakos does not controvert this.

** The law is now settled in this Circuit that a notice of readiness by the Government only becomes effective when a plea is entered to an indictment. *United States* v. *Bowman*, 493 F.2d 594 (2d Cir. 1974); *United States* v. *Valot*, 473 F.2d 667 (2d Cir. 1973).

through May 20, the date on which the Government noticed its readiness.*

Judge Cannella also furnished an alternative basis for his decision which, the Government submits, is equally valid. Rule 5(g) of the Plan states that in computing the six month period there should be excluded any "period during which the defendant is without counsel for reasons other than the failure of the court to provide counsel for an indigent defendant or the insistence of the defendant on proceeding without counsel." As has previously been noted, Plagianakos was without counsel between May 13 and May 20, 1974, and that week is therefore excluded from the computation of the six month period. By this calculation, the six month period would have expired not on May 20 but May 27. The filing of the Government's notice thus fell well within that boundary.**

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* Plagianakos' only rejoinder to these impeccable calculations is that the Plan itself makes no provision for extending the six month period if the last day falls on a weekend or legal holiday. (Br. 19). Implicit in this argument, however, is the assumption that rules promulgated by district judges and approved by the judicial council of the Circuit can by silence supersede provisions contained in the Federal Rules of Criminal Procedure. To articulate that assumption is to demonstrate its want of merit.

** Plagianakos seeks to escape the force of Rule 5(g) by citing a portion of Rule 5(b) which provides that a defendant without counsel shall not be deemed to have consented to a continuance unless he has been advised of his rights under the Plan. (Br. 20). In citing this passage Plagianakos has simply confused two entirely separate periods of exclusion: that period excluded by virtue of a continuance (Rule 5(b)) and that period excluded by virtue of the absence of counsel (Rule 5(g)). The week of May 13-20 was not excluded from the computation because the case had been adjourned, but because Plagianakos had no lawyer.

Even if Rule 5(b) were applicable, it would afford Plagianakos no assistance. For it is clear from the record that Plagianakos did not "consent to" an adjournment; he requested it:

"The Defendant: Well, I have a regular lawyer that I have and I am just about getting him. I will have him next week." (Tr. of May 13, 1974, p. 2).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jeremy G. Epstein being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of March 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Richard Rosenbaum, Esq.
Schachter & Rosenbaum
225 Broadway
New York, N.Y.

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jeremy G. Epstein

Sworn to before me this

6th day of March, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975